

BOARD OF APPEALS CASE NO. 081/ 083

*

BEFORE THE

APPLICANT: Seven Hundred One Pulaski
General Partnership

*

ZONING HEARING EXAMINER

REQUEST: Rezone 2 parcels containing
3.79 acres each, from R1 to B3; east side
of Oak Avenue at U.S. Route 40, Joppa

*

OF HARFORD COUNTY

*

Hearing Advertised

*

Aegis: 6/3/98 & 6/10/98

HEARING DATE: July 29, 1998

*

Record: 6/5/98 & 6/12/98

* * * * *

ZONING HEARING EXAMINER'S DECISION

The Applicant is Seven Hundred One Pulaski General Partnership. In Case No. 081, the Applicant is requesting the reclassification of 3.79 acres from the current R1 classification to a B3 classification. The parcel is located on the east side of Oak Avenue and U.S. Route 40 in the First Election District. The parcel is identified as Parcel No. 443, in Grid 3-B, on Tax Map 65.

In Case No. 083, the Applicant is requesting the reclassification of 3.79 acres from the current R1 classification to a B3 classification. This parcel is located on the east side of Oak Avenue and is identified as Parcel No. 434, in Grid 3-B, on Tax Map 65. The two parcels adjoin and are adjacent to an existing B3 parcel that front on U.S. Route 40 which is also owned by the Applicant.

The Applicant is alleging a mistake occurred during the 1989 Comprehensive Rezoning which would justify rezoning the subject parcels to the B3 classification. As a preliminary matter, the Applicant requested that Case Nos. 081 and 083 be consolidated and heard in their entirety in one hearing. The basis for the request was that the parcels are contiguous properties and owned by the same Applicant. No objection was raised and both cases were consolidated. By letter dated September 22, 1998, the Applicant withdrew Case No. 083. Therefore, the only matter before the Hearing Examiner is Case No. 081.

Case Nos. 081/083 - Seven Hundred One Pulaski General Partnership

The first witness to testify was James Medley, who is one of the owners of the subject property. Mr. Medley testified that he is also the owner of Joppa Automatic Transmission, which is situated along U.S. Route 40. Mr. Medley said he is requesting that the property which is currently zoned R1 be rezoned to B3. Mr. Medley said that the proposed use for the property, if rezoned, would be for automotive repairs and he explained that the property is situated on Oak Avenue, which is the only access point to the Oak Avenue rubblefill. Mr. Medley said that in the last 18 months, traffic has increased four or fivefold and that the traffic consists of tractor trailers hauling rubbish into the rubble landfill. He said on a daily basis tractor trailers line up on U.S. Route 40 waiting for the rubblefill to open.

Mr. Denis Canavan appeared and was accepted as an expert in zoning and land use planning. He said he was familiar with the zoning application in Case Nos. 081 and 083 and stated that both properties are individual parcels situated on the east side of Oak Avenue, adjacent to existing B3 zoning on U.S. Route 40. Mr. Canavan testified that he is familiar with the surrounding and subject properties and that he is familiar with the various planning documents and policies in the County which are relevant to the subject property and the surrounding area. He said that he has had an opportunity to study the area around the land use planning to determine the impact of granting B3 zoning of the subject property.

Mr. Canavan identified Applicant's Exhibit No. 2, which is the existing zoning map. He identified the subject property, which is between U.S. Route 40 and the rubblefill. He noted that the property is separated from U.S. Route 40 by another parcel owned by the Applicant which is zoned B3.

Mr. Canavan referenced the aerial photographs which are marked as Applicants' Exhibit No. 3. Mr. Canavan noted that the focal point of the aerial photographs is the rubblefill. Focusing on the subject property, he stated that the property is unimproved and is currently covered by vegetative growth.

Case Nos. 081/083 - Seven Hundred One Pulaski General Partnership

Mr. Canavan identified four streets paralleling and radiating southbound from U.S. Route 40. The four streets are: Rayner, Pine, Oak and Joppa. He said Oak Avenue, with its access point on U.S. Route 40 is the only road that serves as an access to the 43 acre rubblefill. He said between the auto repair business and the rubblefill, there are approximately 5 or 6 single-family detached homes scattered along Oak Avenue. He said although there are still vacant parcels on Oak Avenue, Mr. Canavan testified that it is his opinion that there will not be substantial additional residential development on Oak Avenue.

Mr. Canavan next introduced photos attached to Applicants' Exhibit No. 4. The photos show topography and the existing land uses and traffic on Oak Avenue and U.S. Route 40. Mr. Canavan testified in preparation for his testimony, he reviewed County documents relating to the Oak Avenue rubblefill. Mr. Canavan identified Applicants' Exhibit No. 5 and 15 as related to this facility. Mr. Canavan testified that the County Council approved the Oak Avenue rubblefill on April 12, 1988, and in support thereof, he identified Applicant's Exhibit No. 8, which is the April 12, 1998 County Council minutes.

Mr. Canavan testified that prior to the State of Maryland and Harford County granting approval to amend the Solid Waste Management Plan, there were expert reports prepared, which addressed the life expectancy of the Oak Avenue rubblefill. Mr. Canavan next identified Applicant's Exhibit No. 5, which was a plan prepared by the Ellicott City firm of Engineering Technologies Associates, Inc., for Stancills, Inc. The document was titled, "Phase III, Oak Avenue Rubblefill Permit Application". The document, in part, stated:

"The anticipated life of the fill is thus ten and one-half years. This estimate is highly dependent on economic conditions."

Mr. Canavan testified that the 10-1/2 year life expectancy would have been from 1988 to 1998. Mr. Canavan noted that following the 1989 Comprehensive Rezoning, the operator of the Oak Avenue Rubblefill requested an expansion. Mr. Canavan identified Applicant's Exhibit No. 11, which is a November 10, 1989 letter from Engineering Technologies Associates, Inc., to John Lawther, Solid Waste Division, Maryland Department of the Environment.

Case Nos. 081/083 - Seven Hundred One Pulaski General Partnership

Mr. Canavan continued to testify as to the various studies with respect to the Oak Avenue Rubblefill and finally identified Applicant's Exhibit No. 15, which is entitled, "Oak Avenue Rubblefill" and is dated July 1997. This report also was generated by Engineering Technologies Associates and on page 4 the document states:

"The date when the landfill capacity is reached, it is projected to be in the year 2015. The projection is based on the amount of fill received in 1994, 1995 and 1996."

Mr. Canavan stated that, based on this information, not only will the incompatibility of the rubblefill with the adjacent land use continue, but it will exacerbate not only by an increase in truck traffic, but by virtue of the fact that this facility is now the only rubblefill in Harford County.

Mr. Canavan then testified concerning the mistake of fact. He said that, in his opinion, there was a mistake of fact involving the Seven Hundred One General Partnership property during the 1989 Comprehensive Rezoning. In his opinion, the mistake in fact is an error as to the operation of the rubblefill and the duration or life expectancy of the facility. Mr. Canavan testified that at the time of the Comprehensive Rezoning of 1989 and based on the 1988 report, the County Council was told or believed that the life expectancy of the rubblefill was 10 years. Mr. Canavan continued that considering the fact that the rubblefill will continue in use until the year 2015, the R1 classification is not a proper use for the subject property.

Mr. Canavan next testified that given the existence of the mistake, which is not only shared by this property but by all properties on Oak Avenue, it is his expert opinion that there was a mistake in the comprehensive rezoning. Considering the long term nuisance brought about by the rubblefill, in Mr. Canavan's opinion, the property should be zoned something other than R1.

Mr. Canavan concluded his testimony by showing a video tape, which was marked Applicant's Exhibit No. 16. The video tape identifies the subject property, surrounding commercial uses and the rubblefill operation.

Case Nos. 081/083 - Seven Hundred One Pulaski General Partnership

Ms. Robin Lange testified that she is President of the Route 40 Business Association. Ms. Lange testified she is familiar with the subject property and believed that it should be rezoned from R1 to B3 since every other property along U.S. Route 40 has a commercial or industrial classification.

Mr. William B. Snyder, Jr. testified he previously owned a steel fabricating company/machine shop/retail sales business at the end of Oak Avenue. He further testified that he currently is employed as a realtor. Mr. Snyder said that it did not make sense to construct new single-family homes on R1 zoned property and responded he thinks it is a mistake in zoning because no one in their right mind would build a new home next to a rubblefill operation adjacent to a commercially zoned properties on U.S. Route 40.

Mr. Anthony McClune, Chief of Current Planning for the Department of Planning and Zoning, appeared and testified that the subject property, as well as the rubblefill, is designated as low intensity in the 1988 and 1996 Land Use Plan. He said the position of the Department of Planning and Zoning is that the R1 zoning is appropriate for a low intensity designation and that a B3 zoning would not be appropriate.

Mr. McClune noted that in 1996 when the Land Use Plan was updated, it was clearly the intent of the County Council that, in the long run, this area will be and remain a low intensity area with residential zoning as the primary zoning in the area. Mr. McClune stated that it is the intent of the County to allow non-conforming uses to eventually cease. Furthermore, Mr. McClune said it is not the intent of the County to deviate from the Land Use Plan to rezone the area around the non-conforming use. Mr. McClune went on to testify that it was his opinion when the 1988 and 1996 Land Use Plans were adopted, as well as the 1988 Comprehensive Rezoning that the County Council was aware of the existence of the rubblefill, as well as the proposed expansion of the rubblefill.

Mr. McClune also testified that he did not believe the rubblefill would remain in operation to the year 2015. Mr. McClune pointed out that the studies generated by Engineering Technologies Associates, Inc. were projections and it was his opinion that the rubblefill would complete operations prior to that time.

Case Nos. 081/083 - Seven Hundred One Pulaski General Partnership

Several area residents appeared and testified in opposition to the request. The area residents expressed concern that creation of additional B3 property would intensify the traffic congestion and dirty roads. The area residents also testified that they disagreed with the projected life expectancy of the rubblefill. One person testified that he has recently purchased a lot on Oak Avenue for the purpose of constructing a residential dwelling, but indicated that he probably would not construct the dwelling until the rubblefill closes.

CONCLUSION:

The Applicant filed an application in Case No. 081 to reclassify 3.79 acres from the R1 classification to the B3 classification for property identified as Parcel No. 443, in Grid 3-B, on Tax Map 65.

In Case No. 083, the Applicant filed an application requesting reclassification from R1 to B3 classification of 3.79 acres, which is identified as Parcel No. 434, in Grid 3-B, on Tax Map 65. Subsequently, the Applicant requested that the application to rezone the parcel identified as Parcel No. 434 in Case No. 083 be dismissed.

Therefore, the only matter before the Hearing Examiner is Case No. 081, which is a request to rezone 3.79 acres from R1 to B3. That parcel is identified as Parcel No. 443 in Grid 3-B on Tax Map 65.

The rule to apply when deciding whether to reclassify property is the change-mistake rule. The change-mistake rule in Maryland applies to all piecemeal or local rezonings. Scully v. Coleman, 251 Md. 6 (1968).

The Applicant did not introduce evidence of change in the character of the neighborhood and is, therefore, relying on a mistake in the last comprehensive rezoning. Once an applicant proves a mistake in the last comprehensive rezoning, any denial of the requested reclassification must be sufficiently related to the public health, safety or welfare to be upheld as a valid exercise of police power. Aspen Hill Venture v. Montgomery County Council, 265 Md. 303 (1972).

Case Nos. 081/083 - Seven Hundred One Pulaski General Partnership

The Maryland Court of Special Appeals has defined the term “error” as it applies to a mistake in the last comprehensive rezoning as follows:

“The term ‘error’ as it is used in zoning law does include the failure to take into account projects or trends reasonably foreseeable of fruition in the future. But in order to establish error, there must be evidence to show that such developments were not, in fact, or could not have been, taken into account so that the Council’s action was premised on misapprehension.” Coppolino v. County Board of Appeals of Baltimore County, 23 Md. App. 358, 372 (1974).

In demonstrating a mistake in zoning, there are several alternative approaches. One approach is to show that the initial premise of the Council with respect to the parcel in question was incorrect and consequently the classification assigned at the time of the comprehensive rezoning was improper. Sometimes this involves showing the Council’s unawareness of readily visible physical characteristics and location of the property and failing to take such into account. Howard County v. Dorsey, 292 Md. 351 (1982). Another approach is to show evidence of any events occurring since the time of the last comprehensive zoning which would show that the Council’s assumptions and premises proved invalid with the passage of time. Id.

The Maryland Court of Special Appeals has dealt with the presumption of the validity of comprehensive rezoning as well as what is necessary to overturn that presumption. In Boyce v. Sembly, 25 Md. App. 43 (1975), the Court stated:

“....A persual of cases, particularly those which a finding of error was upheld, indicates that the presumption of validity accorded to a comprehensive zoning is overcome and error or mistake is established when there is probative evidence to show that the assumptions or premises relied upon by the Council at the time of the comprehensive rezoning were invalid. Error can be established by showing that at the time of the comprehensive zoning the Council failed to take into account then existing facts, or projects or trends which were reasonably foreseeable of fruition in the future so that the Council’s action was premised initially by a misapprehension. Error or mistake may also be established by showing that events occurring subsequent to the comprehensive zoning have proven that the Council’s initial premises were incorrect.”

Case Nos. 081/083 - Seven Hundred One Pulaski General Partnership

“Because facts occurring subsequent to a comprehensive zoning were not in existence at the time, and, therefore could not have been considered, there is no necessity to present evidence that such facts were not taken into account by the Council at the time of the comprehensive zoning. Thus, unless there is probative evidence to show that there were then existing facts which the Council, in fact, failed to take into account, or subsequently occurring events which the Council could not have taken into account, the presumption of validity accorded to comprehensive zoning is not overcome and the question of error is not ‘fairly debatable.’” 25 Md. App. at 51.

When the testimony presented in regard to the Applicant’s property are applied to the law as set forth in Boyce, it clearly establishes that a mistake occurred during the 1989 Comprehensive Rezoning. It is, also, apparent that the mistake/error that occurred is substantial and that the property should be rezoned from R1 to B3. It was impossible in 1989 for the County Council to take into account subsequently occurring events, which increased the rubblefill’s life from 1998 to 2015. At the time of the last comprehensive rezoning, the Applicant’s Exhibit No 5, which is entitled “Phase III, Oak Avenue Rubblefill Permit Application” clearly stated, “The anticipated life of the fill is thus ten and one-half years.” Had this projection be accurate, the rubblefill would now be closed. What the Council could not have been aware of during the 1989 comprehensive was that the Oak Avenue Rubblefill was going to receive approval for a substantial expansion of the capacity of the rubblefill.

These “subsequently occurring events” consistent with the test as set forth in Boyce, are chronicles in the Harford County Solid Waste Management Plan 1995-2004 (See Applicant’s Exhibit No. 14). The depth of the fill was increased between 17 to 22 feet without a corresponding reduction in height, resulting in a tremendous amount of additional capacity. Most importantly, the plan states, “This will only prolong the adverse impact to the surrounding community of this rubble landfill operation...”

The Solid Waste Management Plan adopted by the County Council set forth strict standards for all future rubble landfills. Oak Avenue is a pre-existing, non-conforming use and is not subject to the new standards, which make land along Oak Avenue even less appealing for future residential development.

Case Nos. 081/083 - Seven Hundred One Pulaski General Partnership

The Solid Waste Management Plan estimates a new projected life expectancy of the landfill:

“According to MDE, this landfill has an estimated life of ten (10) years in 1992.”

and further states,

“Operation of a rubble landfill on the site is not consistent with surrounding land uses... The heavy truck traffic moving along the road has been and can be expected to continue to be a disturbance to those residents. The County has received numerous complaints from various homeowners... (e.g., noise, debris blowing from the trucks, dirt deposited by the trucks as they come to or leave the landfill, and trash thrown by drivers from the cabs of the trucks).... All of this is the result of the fundamental incompatibility of an unbuffered rubble landfill operation located in a primarily residential area.”

All of this information directly contradicts the information that was available to the County Council in August 1989. They were under the impression the use was winding down and would be gone by 1998. Applicant's Exhibit No. 15 is further proof of this mistake. The July 1997 report from Engineering Technologies Associates, Inc. states:

“The date when the landfill capacity is reached, it is projected to be in the year of 2015. The projection is based on the amount of fill received in 1994, 1995, 1996.”

This is a life expectancy of 17 years more than projected at the time of the 1989 Comprehensive Rezoning.

Several area residents have testified they felt the capacity of the rubblefill would be reached much sooner than the year 2015. The Applicant, however, has attached to their brief a report from Engineering Technologies Associates, Inc., which was submitted to the Department of Planning and Zoning. The report states:

“The date when the landfill capacity will be reached is projected to be the year 2013. This projection is based on the average amount of fill received from January 1995 to December 1997, and assumes that the landfill capacity will be used at this rate in the future.”

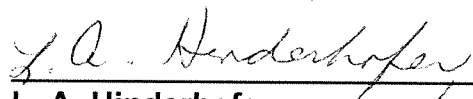
Case Nos. 081/083 - Seven Hundred One Pulaski General Partnership

As noted above, the Applicant has subsequently requested a dismissal of the request to rezone Parcel No. 434, which will allow a transition zone on property owned by the Applicant between the existing residential properties and Parcel No. 443. The transition zone will tend to mitigate any commercial uses which the Applicant will establish on Parcel No. 443 and any residential uses which the Applicant creates on Parcel No. 434 will be subject to the uses created on Parcel No. 443.

When the applicable law as set forth in Boyce, Howard, and Coppolino concerning the doctrine of mistake is applied to the Applicant's rezoning request, the evidence supports the rezoning from R1 to B3. There is sufficient evidence to find a legal mistake occurred during the 1989 Comprehensive Rezoning. At the time of the 1989 Comprehensive Rezoning, the County Council believed the life expectancy of the rubblefill to be 10 years. Accordingly, the Council expected that the fill would be capped and that the property would have an alternate use by now. The Council could not have predicted it would be the only rubblefill in the County and that, via expansion, it would continue to operate and, thus, impact the subject property until possibly the year 2013.

Accordingly, the mistake should be corrected and Parcel No. 443 in Grid 3-B, on Tax Map 65 should be rezoned from R1 to B3.

Date OCTOBER 19, 1998



L. A. Hinderhofer
Zoning Hearing Examiner